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LETTER DATED 19 JANUARY 1998 FROM THE CHAIRMAN OF THE CATEGORY "D" PANEL OF COMMISSIONERS ADDRESSED TO THE DEPUTY EXECUTIVE SECRETARY OF THE UNITED NATIONS COMPENSATION COMMISSION

This refers to your letter reference: UNCC/EXE/512/98 of 8 January 1998 with regard to the consideration by the Governing council at its twenty-sixth session of part one of our Panel's report and recommendations concerning the first instalment of category "D" claims. I am responding to your letter after having discussed the issues considered by the Council with my other colleagues on the Panel.

We much regret that some confusion has been caused by the way in which the word "alone" has been used in paragraph 75 of our report in relation to reliance upon an Acceptable Explanatory Statement.

Before explaining the Panel's intention and understanding as set out in paragraph 75, I would like to take this opportunity to respectfully reassure Members of the governing Council that for the purpose of dealing with claims in category "D", and while considering the claims in the first instalment, the Panel has been acutely conscious of the evidentiary requirement for the category "D" claims established by the Governing Council. This will also be apparent from what has been stated in, for example, paras 7, 67, 69 and 70.

To explain the Panel's intention and understanding with respect to the use of an Acceptable Explanatory Statement, I would like to invite reference to the preceding paragraphs, in particular paragraphs 72 and 74 of the report. As stated in paragraph 72, the Panel concluded that in the difficult circumstances of the invasion and occupation of Kuwait "many claimants cannot, and cannot be expected to, document all aspects of a claim". It is then stated that the level of proof the Panel has considered appropriate is close to what has been called "balance of probability" as

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distinguished from the concept of "beyond reasonable doubt" required in some jurisdictions to prove guilt in a criminal trial. Therefore, where a claimant was unable to document all aspects of a claim (but only some of them), the Panel concluded, as stated in para 74, that "in respect of certain loss types, significant weight must be given to, and reliance can be placed upon, a clear explanatory statement in support of the particulars in the "D" claim form". As will be apparent from what is stated later in the report (e.g. paras 107, 160, 166) the kinds of loss types the Panel particularly had in mind were departure claims, being taken as a hostage, forced hiding, death claims and resulting Mental Pain and Anguish (MPA) or loss of support. In each of such cases, an Acceptable Explanatory Statement is only intended to be relied upon as supplementary evidence provided other surrounding circumstances justify doing so. In other words, the intention has been that where there is a gap in the claimant providing complete documentary evidence to support a particular kind of loss type, the Acceptable Explanatory Statement, given the surrounding circumstances, might be relied upon to fill such a gap. The intention has not been that the Acceptable Explanatory Statement could be relied upon where there was no other evidence at all.

As will be seen, even in the definition of an Acceptable Explanatory Statement in paragraph 75, the requirement is for an explanation for the absence of "additional documentary evidence". When making a reservation regarding use of an Acceptable Explanatory Statement in respect of future larger and more complex loss types, it was the Panel's intention to indicate that in such future cases even an Acceptable Explanatory Statement may not be sufficient to explain the absence of additional documentary evidence which the Panel might consider absolutely essential in a particular set of circumstances. In other words, in the case of future larger and more complex loss types, even an Acceptable Explanatory Statement may not be regarded as sufficient to cover the gap in the documentary evidence.

I would also like to reaffirm the assurance already provided by you to the Governing Council that no claim in the first instalment has been approved only on the basis of an Acceptable Explanatory Statement. In relation to the eight claims where an Acceptable Explanatory Statement was taken into consideration, four were MPA claims related to departure, being taken as hostage or death claims, one was a D1 (Money) claim related to departure expenses, there were two support claims out of D3 death cases and one a D6 (loss of income) claim. In each of these cases, there was other documentary evidence and an Acceptable Explanatory Statement was only referred to by way of supplementary evidence. In fact, in regard to the MPA claims relating to hostage taking and forced hiding of one Irish claimant and one Swedish claimant, some reliance

was also placed on one of the background reports indicating that nationals of OECD countries were held as hostages and some used as "human shields" (paragraph 143).

I would therefore respectfully submit for the Governing Council's consideration, that there should be no apprehension that an Acceptable Explanatory Statement has been or will be used to recommend payment of a claim where there is no other documentary evidence.

[Signed] R.K.P. Shankardass
Chairman
Category "D" Claims
Panel of Commissioners